IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 317

HANS LUDWIG BENZIAN,
Petitioner,

v.

SAUL GODWIN, Chairman, and IRVING J. HESS, LEONARD E. SCHWALBE, IRVING SABSEVITZ and CLIFFORD N. OWEN, Members of Local Board No. 65, Manhattan, City and State of New York, UNITED STATES SELECTIVE SERVICE SYSTEM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS THE PETITION

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The Solicitor General, on behalf of the respondents, has moved the Court to dismiss the petition for certiorari on the ground that the cause has abated.

1. The motion is improper. Rule 7 of the Rules of the Supreme Court states:

> "No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

The cases cited by the Government provide no authority for this motion. All were concerned with motions to dismiss writs of certiorari, not petitions for the writ, or with motions to dismiss writs of error or appeal. The motion should be denied.

In the event that the Court elects to regard respondents' motion and memorandum of law in support thereof as a brief in opposition to the petition, albeit incorrectly labelled, petitioner respectfully submits this memorandum of law in reply to the claim that the cause has abated. In the further event that the Court holds the cause has not abated, and is prepared to consider the petition for a writ of certiorari on the merits, despite the Government's failure to serve and file a brief in opposition within the time and manner prescribed by the Rules, petitioner has no objection. We believe the issue raised herein is unique, and should be fully and fairly heard by the Court.

2. The Government contends that the services of respondents, as members of Local Board 65, Manhattan, City and State of New York, were terminated, along with the existence of the Board itself, in the spring of 1947; that no successors to respondents or to their authority or that of the Board have been created; and that this suit against respondents as members of the demised Local Board No. 65 must therefore be dismissed as abated. As will appear, the result of the Government's argument is that even if the Board's erroneous interpretation of law has wrongfully deprived petitioner of his right ever to become a citizen of the United States, petitioner has no remedy for that wrong, judicial or administrative. If petitioner cannot continue this action against respondents, there is no person or body against whom he can maintain any action to right the wrong committed.

We submit that procedural niceties do not require the perpetuation of this injustice, that the cases relied upon

by the Government do not require it, that the statute relied upon need not be interpreted to produce it, and that due process of law stands here as a bar to administrative wrong without judicial remedy. Moreover, we believe that the question of abatement, raised for the first time in this Court, although available to the Government in the District Court, should not be determined against petitioner at this stage without affording him an opportunity to argue the question fully before some Court, and that the presence of the question, which we believe to be wholly novel as well as important, provides rather an additional ground for granting certiorari than a ground upon which to deny it.

3. The Government cites the familiar doctrine that an action to compel or restrain official action cannot be continued against one who, *pendente lite,* has left the office, and can be maintained only against the successor-incumbent by way of substitution in the original action (8 U. S. C. § 780; Rule 25(d) of the Federal Rules of Civil Procedure), or by the commencement of a new proceeding. We do not believe the doctrine is applicable when the remedy sought —declaratory judgment—requires neither that official action be compelled or restrained, and when the abolition of the office itself bars continuance or renewal of the claim against a successor.

The rationale of the decisions cited by the Government was succinctly expressed by Mr. Justice STRONG in the leading case of *United States* v. *Boutwell,* 17 Wall. 604, involving a petition for a writ of mandamus to the Secretary of the Treasury:

> "The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent . . . If he be an officer and the duty be an official one, still the writ is aimed exclusively at him as a person, and he can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is therefore

> in substance a personal action . . . Where the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased" (17 Wall. at 608).

Of the cases cited in the Government's brief, those involving applications for injunctions against action threatened by a federal or state officer were held to have abated on the ground that a respondent no longer holding his official position could no longer take the threatened official action. *Shaffer* v. *Howard*, 249 U. S. 200; *Ex Parte La Prade*, 289 U. S. 444; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28. The cases involving writs of mandamus or habeas corpus requiring the officer affirmatively to take official action were held to have abated on the ground that a respondent no longer holding his official position is powerless to perform an official act. *Le Crone* v. *McAdoo*, 253 U. S. 217; *U. S. ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600; *U. S. ex rel. Claussen* v. *Curran*, 276 U. S. 590.

There is logic in holding that an action against an individual in his official capacity abates when his loss of that capacity renders him powerless to commit the act sought to be restrained or compelled. But that logic is lacking where relief can be effected without restraint or compulsion upon the former officer, and where the illegal and permanent disability imposed by his past action is otherwise beyond judicial remedy. Such is the situation presented by this action for a declaratory judgment. The judgment prayed for, declaring (a) that petitioner's purported registration under the Selective Service Act and his execution of Selective Service Form 301 were nullities, and (b) that Section 303(a) of Title 50, U. S. C. App. does not render petitioner ineligible for United States citizenship, will afford petitioner effective relief from his present disability. Judicial declaration, upon a complaint served upon respondents when they were qualified and acting in

their official capacities, that their official acts were nullities will effectively remove a continuing bar to petitioner's eligibility for United States citizenship and for permanent residence in the United States.

The gravamen of the complaint does not lie in future action threatened by respondents, nor does the effectiveness of the remedy depend upon action to be taken by them. Manifestly, rules of abatement reasoning that the loss of office deprives the respondent of the power to do what the petitioner fears or desires have no application where the action is not conditioned on respondents' power to do anything. Careful study has failed to uncover a single case holding that the doctrine of abatement applies where the relief sought is a declaratory judgment as to the validity of past acts.

4. We have said that the logical basis of the rule respecting abatement has no relevance for this action for declaratory judgment. If it be said that the rule rests not only on logic, but on some practical judgment that the responsibility for directing litigation defending official action should rest with the presently responsible officer, and not with his presently non-responsible predecessor, such practical considerations surely have no place when the office is abolished and there is and can be no incumbent. The action, begun while respondents held office, is defended in any event by the Attorney General.

Abatement has never been thought to destroy the underlying cause of action; it affects only the particular litigation. *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530. The Government's position is that the cause of action is destroyed where the office is abolished, although neither the logic nor any policy judgment embodied in the rule of abatement requires that result.

5. The provisions of the revival statute and of the Rule permitting substitution of the incumbent where the re-

spondent has left office (8 U. S. C. 780, Rule 25 (d) of the Federal Rules of Civil Procedure) are inapplicable to this case. If the Local Board of which respondents were members no longer exists, it is equally true, as the Government itself asserts, that no other persons or agency have succeeded to the functions of respondents or of their Board. There is consequently no successor who may be substituted under the statute or the Rule. It was for this reason that petitioner made no motion to substitute.

6. If, as the Government has argued below, petitioner's ineligibility for citizenship survives the repeal 50 U. S. C. App. § 316) of the Selective Service Act, (See 1 U. S. C., Supp. V., § 29), then, by the same token, the body imposing the disability must survive the repeal for the limited purpose of litigating the validity of its determination of disability. We do not believe that the language of Section 316 of Title 50 U. S. C. App., rendering "inoperative" the sections of the Selective Service Act providing for Local Boards (50 U. S. C. App. § 310), requires the conclusion that the Local Boards lack continued existence for the vestigial purpose of defending pending litigation regarding acts having continuing effect, and with respect to which no other judicial remedy is available. To construe Section 316 otherwise is, at the least, to raise serious doubts as to its constitutionality.

7. If the members of Local Board No. 65 no longer have any continuing official status, even for the purposes of this action for a declaratory judgment, petitioner is left in an impossible position. The Government does not suggest, and we do not believe, that there is anyone else whom the petitioner can sue to remove the continuing ineligibility for United States citizenship which he claims was wrongfully and unconstitutionally imposed upon him. Nor is this a circumstance which petitioner might have prevented by originally instituting his action against some other respond-

ent. Petitioner might perhaps have sued the Director of Selective Service (holding office under the Selective Service Act of 1940), but such a suit would be subject to precisely the same claim of abatement made here with respect to the Local Board.

The Government's claim here is constitutionally untenable because it is more than a plea in abatement. It is a claim that the abolition of the Local Board has destroyed the cause of action, and that petitioner is without any remedy whatsoever for a continuing wrong. It deprives petitioner of liberty and property without due process of law by destroying the right guaranteed by the Fifth Amendment to judicial review of an administrative determination depriving him of liberty and property. *Ng Fung Ho* v. *White*, 259 U. S. 276.

The Government's position, baldly stated, is that Congress may create an administrative board to determine questions of law, impose serious and continuing disabilities on the basis of such determinations, and then bar judicial review of those determinations by abolishing the agency which rendered them. This principle, we submit, offends reason, conscience, and the Fifth Amendment.

We need not argue here that due process requires that every administrative determination be subject to judicial review. *Ng Fung Ho* v. *White, supra*, holds that the Fifth Amendment imposes such a requirement with respect to deportation orders. We believe that the right to become a citizen of the United States stands no lower in this regard than the right to remain a resident of the United States. But even if that were not so, petitioner's case lies within the holding in *Ng Fung Ho*, since, as the complaint alleges, petitioner is subject to deportation if he is not eligible for citizenship. (R. 12; 8 U. S. C. § 213 (c); 8 U. S. C. § 224 (c)).

8. The Government expresses regret that the point of abatement was not taken at an earlier stage of this litiga-

tion. That the point was not earlier taken is indeed regrettable, but it has been held that delay in making the claim may bar the claim itself. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422 (1933), was a habeas corpus proceeding against the District Director of the Immigration Service in Chicago, brought by an alien arrested under an outstanding deportation order. While the proceeding was pending, the respondent was transferred, and a successor appointed. The objection that the suit had abated was not raised by the Government until the argument before this Court on certiorari. The Court disposed of the claim by remarking that

> "the cause was permitted to proceed without question, as instituted, long after Smith is said to have left Chicago; and the petitioner insists that no cause is shown for abatement. The point, we think lacks merit" (289 U. S. at 426).

Concededly, the respondent official in the *Volpe* case still occupied another post in the Department of Labor, from which he might conceivably have arranged the effectuation of the deportation order. But he no longer was District Director in Chicago, the position in which he was sued. Respondents here may no longer hold their positions, but a declaratory judgment against them will secure petitioner's rights as well as the writ directed against the former District Director.

The record of delay here is as impressive as in the *Volpe* case. After the termination of respondents' services as members of Local Board No. 65 on May 29, 1947, the Government permitted this cause to proceed for more than seventeen months, to be heard in the District Court on June 17, 1947, and in the Circuit Court of Appeals on June 30, 1948, without raising the point. It should not be permitted to raise it for the first time at this stage.

9. We urge that the Court should not hold that this action, determination of which will establish the substantive rights of many thousands of aliens situated as is petitioner, has now abated, and that petitioner is consequently left without remedy. We submit that the petition for certiorari should be granted.

Dated: New York, N. Y.
November 23, 1948.

Respectfully submitted,

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